

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 MIDLAND-ODESSA DIVISION

4 TRUE CHEMICAL) Docket No. MO 18-CA-078 ADA
5 SOLUTIONS, LLC)
6)
7 vs.) Midland, Texas
8)
9 PERFORMANCE CHEMICAL)
10 COMPANY) February 24, 2021

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TRANSCRIPT OF VIDEOCONFERENCE MOTION HEARING
BEFORE THE HONORABLE ALAN D. ALBRIGHT

9 APPEARANCES:

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1 | (Appearances Continued:)

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25 Proceedings reported by computerized stenography,
transcript produced by computer-aided transcription.

08:01:31 1 THE CLERK: Court calls Midland case:

08:01:36 2 7:18-CV-78, True Chemical Solutions, LLC vs. Performance

08:01:42 3 Chemical Company, for a motion hearing.

08:01:44 4 THE COURT: Good morning.

08:01:44 5 If I could hear -- give me one second. If I can

08:01:47 6 hear announcements from counsel, please.

08:01:52 7 MR. SCARDINO: Sure.

08:01:52 8 This is Daniel Scardino here for Performance

08:01:56 9 Chemical Company, together with Robyn Hargrove, who will

08:02:00 10 be arguing today for Performance Chemical Company.

08:02:04 11 MS. HARGROVE: And, your Honor, we also have

08:02:06 12 Paige Amstutz here, as well.

08:02:07 13 THE COURT: Okay. And for True Chem?

08:02:17 14 MR. LIAO: Morning, your Honor.

08:02:18 15 This is Louis Liao for True Chem. We're actually

08:02:24 16 waiting on Mr. John. I don't know where he is, but Masood

08:02:28 17 Anjom is also on this call.

08:02:29 18 THE COURT: Okay. Who's going to be arguing on

08:02:32 19 behalf of True Chem?

08:02:33 20 MR. LIAO: We expect Mr. John to argue, but if I

08:02:36 21 have to, then I guess so.

08:02:40 22 THE COURT: My problem is ordinarily --

08:02:43 23 THE CLERK: He's right there.

08:02:44 24 THE COURT: Okay. There he is. Good morning.

08:02:54 25 THE CLERK: Mr. John, would you like to make your

08:02:57 1 appearance to the Court? The Court's ready to proceed.

08:03:01 2 MR. JOHN: Thank you. This is Jaison John for
08:03:03 3 True Chemical.

08:03:06 4 MR. MORGAN: This is Terry Morgan for True
08:03:08 5 Chemical, also.

08:03:09 6 THE COURT: Good morning.

08:03:10 7 It's True Chem's motion. I'll hear from you, Mr.
08:03:13 8 John.

08:03:17 9 MR. JOHN: Your Honor, I'm happy to begin. Thank
08:03:20 10 you.

08:03:21 11 This is emergency motion filed by PCC, but if the
08:03:28 12 Court desires, I'm happy to begin.

08:03:33 13 MS. HARGROVE: Your Honor, it's our motion, we're
08:03:35 14 also happy to start out.

08:03:37 15 THE COURT: I think the way I'm thinking about it
08:03:38 16 is, I know -- I'd like to hear from Mr. John why we
08:03:43 17 shouldn't transfer it. I've read the motion. Mr. John,
08:03:46 18 if you'd like to tell me why you think we should not
08:03:49 19 transfer, I'm happy to hear that, and I'll hear from Ms.
08:03:51 20 Hargrave.

08:03:53 21 MR. JOHN: Thank you, your Honor.

08:03:54 22 So, your Honor, this case involves frac trailers
08:03:59 23 that are built and located in Midland, primarily operating
08:04:04 24 in the Midland area and in the Permian Basin area, and
08:04:11 25 both parties are based in Midland. Their employees are in

08:04:17 1 Midland. The customers primarily operate in the Midland
08:04:20 2 area. The witnesses in this case are overwhelmingly from
08:04:26 3 Midland, and I'll address that in a moment. The case was
08:04:29 4 filed in Midland. This case was litigated over three
08:04:36 5 years in Midland and without any objection from PCC until
08:04:40 6 the eve of trial.

08:04:42 7 Neither party has any operations in Midland and
08:04:47 8 there are no witnesses -- I'm sorry. Neither party has
08:04:51 9 operations in Waco.

08:04:52 10 THE COURT: All right. Mr. John, let me ask
08:04:56 11 because I'm about to go, actually, and sit in trial. So
08:05:00 12 let me speed you along just a little bit here, if I can.

08:05:02 13 Here's -- you're absolutely right. I understand
08:05:06 14 everything you just said about the parties, where the
08:05:08 15 parties are, where -- and all that. This is a question,
08:05:14 16 though, over convenience, I think, with an intra-district
08:05:22 17 transfer. The question -- and I get it. Midland has an
08:05:26 18 interest. I understand.

08:05:28 19 But if you could address your opposing counsel's
08:05:31 20 argument that for the benefit of witnesses and getting
08:05:35 21 them to trial at Waco would be better, if you could
08:05:38 22 address that specifically.

08:05:40 23 MR. JOHN: Your Honor, there are 17 fact
08:05:44 24 witnesses in this case, and PCC seem to ignore some of the
08:05:49 25 party witnesses, but there are 17 fact witnesses.

08:05:51 1 Fourteen of those fact witnesses live in the Midland area,
08:05:57 2 three are elsewhere, but none of them are in Waco. The
08:06:00 3 Court will lose subpoena power on a majority of the fact
08:06:04 4 witnesses if the trial were in Waco. The Court will not
08:06:08 5 gain any subpoena power in Waco.

08:06:13 6 And I can show the Court a document that lists
08:06:19 7 the witnesses, and the Court can see, you know, where the
08:06:24 8 convenience of these witnesses stand, if I may.

08:06:27 9 THE COURT: Yes. Please.

08:06:31 10 Here's the issue -- and I get, again, the folks
08:06:40 11 that are starting with Fuller and through Gabriel, those
08:06:44 12 are all under the control of the parties, right?

08:06:48 13 MR. JOHN: That's correct, your Honor.

08:06:48 14 THE COURT: Okay. And so, our real question here
08:06:51 15 is, the witnesses who live in Kerrville, Fort Worth,
08:07:01 16 Midland-Odessa, Tomball, and then, the others, I see, as
08:07:07 17 well. Okay.

08:07:13 18 MR. JOHN: So.

08:07:13 19 THE COURT: Yes, sir.

08:07:14 20 MR. JOHN: Your Honor, so these other witnesses,
08:07:18 21 many of them are going to be in the subpoena power of the
08:07:20 22 Midland court. And further, as you can see, all these
08:07:24 23 witnesses, majority of them are from the Midland area, so
08:07:28 24 they're not going to require much travel. And that's the
08:07:31 25 other issue that PCC had brought up. The COVID-related

08:07:37 1 pandemic issues. But having the trial in Midland will
08:07:42 2 allow the case to conform more to the CDC requirements
08:07:47 3 because it avoids unnecessary travel. The witnesses can
08:07:50 4 remain mostly at home until called to trial.

08:07:53 5 Otherwise, every single witness, your Honor, will
08:07:55 6 have to travel to Waco and get hotel rooms, and that's a
08:08:02 7 safety issue. And I just want to express to the Court
08:08:06 8 that it's not True Chemical's burden to show that Midland
08:08:14 9 is better. The heavy burden is -- as case law states is
08:08:19 10 on PCC. And the convenience of the parties clearly
08:08:26 11 indicate whether they're party witnesses under the party's
08:08:28 12 control or not, they're all in Midland. And the case has
08:08:34 13 proceeded fine in Midland.

08:08:36 14 PCC does cite to the Intel --

08:08:41 15 LAW CLERK: Talking about letting them know that
08:08:42 16 we would have more time for trial if we did it here than
08:08:45 17 in Midland. I don't know if you want to do that.

08:08:48 18 THE COURT: Ms. Hargrove.

08:08:51 19 MS. HARGROVE: Yes, your Honor. I'm going to
08:08:53 20 dive straight into this question of witnesses. And I'm
08:08:56 21 happy to address other factors that your Honor feels are
08:08:59 22 important. But on this question of where the witnesses
08:09:02 23 are located, the nonparty witnesses here, your Honor, are
08:09:06 24 not in Midland area. And I can show -- and it's important
08:09:11 25 to correct that because we seem to have a bit of a

08:09:14 1 disagreement.

08:09:16 2 But the exhibits that we presented in support of
08:09:19 3 our motion, our Exhibit D, Mr. Scardino's declaration
08:09:27 4 proved up the location of all these witnesses. And I'm
08:09:31 5 sorry, I'm taking a moment because I want to pull up and
08:09:34 6 share my screen and show that to the Court.

08:09:36 7 THE COURT: Okay.

08:09:37 8 MS. HARGROVE: Can you see that?

08:09:39 9 THE COURT: Yes, ma'am.

08:09:40 10 MS. HARGROVE: Listing? Okay. Great.

08:09:42 11 THE COURT: I can only see --

08:09:45 12 MS. HARGROVE: Yeah. Let me see if I can try to
08:09:48 13 -- there we go. Make it legible and yet, all in one
08:09:52 14 screen.

08:09:53 15 So here, we have a listing of the individuals who
08:09:56 16 are on both parties' may-call live or will-call live
08:10:00 17 lists. You will see that all of those -- none of those
08:10:07 18 parties are in Midland. None of these witnesses are in
08:10:09 19 Midland. The one individual who is closest to Midland is
08:10:12 20 Mr. Jeffrey McMahon. He is a PCC contractor who has
08:10:15 21 indicated he will voluntarily come to trial, if needed.
08:10:20 22 None of the remaining witnesses are subject -- are within
08:10:26 23 100 miles of Midland. The rest of them are dramatically
08:10:30 24 closer to Waco than to Midland.

08:10:34 25 So to the extent the Court would be subpoenaing

08:10:36 1 those witnesses, it still may do so under Federal Rule
08:10:42 2 45(c); but because they're more than 100 miles, the
08:10:45 3 relative distance and, therefore, the cost to the
08:10:48 4 witnesses becomes relevant to the subpoena analysis. And
08:10:51 5 so, for those remaining 10 individuals, the Court's
08:10:56 6 subpoena power over those individuals is greater.

08:10:58 7 Now, the most important factor of which I'm sure
08:11:02 8 you're well aware, your Honor, is this question of the
08:11:06 9 convenience of these third-party witnesses. Not the party
08:11:09 10 witnesses, but the third party. If you look at the
08:11:12 11 cumulative distance of these individuals, how far they are
08:11:16 12 from the Waco courthouse versus the Midland courthouse,
08:11:19 13 there's a cumulative over a 2,100-mile difference there of
08:11:25 14 travel time.

08:11:27 15 And that's really significant right now because
08:11:31 16 it impacts their ability to travel by car, instead of by
08:11:35 17 plane. It impacts whether or not they may be able to do
08:11:38 18 this in a day trip, instead of having to stay overnight in
08:11:41 19 a hotel. It impacts expense, it impacts how much time
08:11:45 20 they take off work, and it impacts their overall potential
08:11:52 21 COVID exposure. So these are of particular importance in
08:11:54 22 the situation we find ourselves today with the pandemic.

08:11:57 23 And I do want to correct as to a few of these
08:12:00 24 witnesses, True Chemical is claiming that they are located
08:12:03 25 in Midland, rather than Waco, but as we have proved up

08:12:07 1 through Mr. Scardino's declaration, Jose Luna is now
08:12:13 2 located in Fort Worth. He is not in Midland. You'll see
08:12:16 3 that on here. B&H is the newly identified party with
08:12:24 4 information regarding the automation of frac trailers.
08:12:28 5 That entity by the Secretary of State filings, we can see
08:12:32 6 that entity is out at Houston, and we would be
08:12:34 7 anticipating that would be a corporate rep. So the
08:12:36 8 location of the entity, not just the registered agent for
08:12:40 9 service of process, but the entity itself is Houston.

08:12:43 10 We've got -- there were two individuals, Matthew
08:12:47 11 Sanchez and Michael Herd, who True Chemical has mentioned,
08:12:51 12 those are folks who have never been disclosed before in
08:12:54 13 this case. They're not on either side's witness lists.
08:12:57 14 They're mentioned because they're affiliated apparently in
08:13:00 15 some way with Integrity Industries and PFP Industries, and
08:13:05 16 they happen to be employees located in the Midland area
08:13:08 17 but --

08:13:08 18 THE COURT: Ms. Hargrove.

08:13:10 19 MS. HARGROVE: Yes, sir.

08:13:11 20 THE COURT: Let me assure you, if they haven't
08:13:13 21 been disclosed before then, they're not going to be
08:13:15 22 traveling either to Waco or to the courthouse in Midland,
08:13:18 23 wherever we wind up. So I have pretty strong feelings
08:13:23 24 about witnesses, when witnesses should be disclosed. But
08:13:28 25 your point's taken.

08:13:29 1 Let me -- here's where I see the balance. Mr.
08:13:33 2 John, if you'll respond to this. I certainly understand
08:13:36 3 your point you've got X number of witnesses that are from
08:13:40 4 the plaintiff and Y number from the defendant, and they
08:13:43 5 appear to be mostly, if not all, in the Midland area. I
08:13:47 6 get your argument that they won't have to travel. I will
08:13:51 7 tell you, though, I am persuaded that for the safety of
08:13:55 8 the nonparty witnesses, Waco would be better. And then,
08:14:01 9 let me say one more thing here. Let me ask you first.

08:14:04 10 Mr. John, have I given you all a number of hours
08:14:06 11 for trial in this case?

08:14:08 12 MR. JOHN: Yes, you have.

08:14:09 13 THE COURT: And what was it?

08:14:10 14 MR. JOHN: It was 10 hours.

08:14:12 15 THE COURT: Okay. That's what I recall. If you
08:14:15 16 guys think that you're going to be able to put on, what is
08:14:21 17 it, how many would you say, Mr. John, 17 witnesses?

08:14:24 18 MR. JOHN: Yes, sir.

08:14:25 19 THE COURT: In that period of time, one or all of
08:14:28 20 you will be magicians in my opinion because I see
08:14:36 21 absolutely no way we're going to have this number of
08:14:38 22 people in that amount of time. And so, that's, I guess,
08:14:45 23 for another day. But, you know, in the trial I'm in right
08:14:50 24 now, we've -- you know, I think they're going to have a
08:14:54 25 total of maybe eight witnesses and they have two patents,

08:14:57 1 and they had more time than you did. So it's -- y'all are
08:15:02 2 going to have to really do some magic to get that many
08:15:05 3 witnesses on.

08:15:05 4 But address this, Mr. John. This is where I'm
08:15:08 5 ultimately going to have to come down. How do -- is there
08:15:13 6 case law that tells me what I do if I think that at this
08:15:22 7 point -- and there may or may not be because we've only
08:15:26 8 been dealing with COVID for a limited amount of time and I
08:15:28 9 think it is a factor here.

08:15:31 10 Is there case law that tells me not just with
08:15:35 11 regard to the ability of the court to get someone
08:15:39 12 somewhere or all that, but is there case law that explains
08:15:43 13 balancing that I could do here and tells me what I should
08:15:47 14 do? I'm spotting you that I think the majority of people
08:15:51 15 from who are parties would be in Midland, I think the
08:15:57 16 opposite is true of the nonparty witnesses. I think it
08:16:01 17 would be easier to get the nonparty witnesses to require
08:16:08 18 them to attend.

08:16:09 19 So tell me -- I'll give you an opportunity to
08:16:11 20 tell me how I balance that to come out, and I'll give Ms.
08:16:16 21 Hargrove the same opportunity.

08:16:17 22 MR. JOHN: Your Honor, case law says that the
08:16:20 23 time to challenge venue is not at the end of the trial,
08:16:25 24 but right before trial. Not at the end of the case.

08:16:28 25 THE COURT: This isn't venue. This is the

08:16:30 1 convenience of the parties. And in this case, I'm also
08:16:36 2 dealing with -- which I just did. I moved the case from
08:16:39 3 Austin to Waco. They're not open in Austin. I get that
08:16:44 4 they are open in Midland.

08:16:45 5 But part of the logic I'm using is -- and this is
08:16:50 6 what I want you to focus on is. I see it as a -- I have
08:16:55 7 to do a balancing between the people who live in Midland
08:16:59 8 who are primarily party witnesses and over whom you have
08:17:04 9 control and their safety, and the balancing of the
08:17:08 10 interests of the nonparty witnesses and my ability to
08:17:12 11 control. And, so, that's where I would ask you to focus
08:17:16 12 your attention.

08:17:17 13 MR. JOHN: Okay, your Honor. Even with the
08:17:20 14 convenience issue, the only change that could possibly
08:17:28 15 happen right now is because of the COVID issue. Well, if
08:17:31 16 that's the case, I want to address some of the issues that
08:17:40 17 Ms. Amstutz brought up about the third-party witnesses.
08:17:44 18 They had asked for corporate representatives of PRRO
08:17:49 19 Water, Integrity Industries and PfP. The corporate
08:17:52 20 representatives that have dealt with True Chem that could
08:17:59 21 possibly be related to anything in this case, they're all
08:18:03 22 located in Midland, your Honor. And the example, the B&H
08:18:10 23 Industries, that was just a registered agent that --
08:18:14 24 THE COURT: Mr. John, why don't -- I want you to
08:18:17 25 address my question. The defendant -- I'm sorry. Ms.

08:18:23 1 Hargrove's client gets to pick the witnesses they think
08:18:26 2 are best for trial, and you get to pick the witnesses you
08:18:28 3 think are best. I want you to address my question, not
08:18:32 4 whether or not you think there's merit in selecting and
08:18:35 5 calling those people.

08:18:37 6 What I'm asking you now -- I'm assuming if you
08:18:39 7 all have all these people on this list, you acted in good
08:18:44 8 faith in exchanging this list with each other, and you
08:18:47 9 really do plan to call all these people. Again, I can't
08:18:51 10 imagine how that could be accomplished, but I'm assuming
08:18:57 11 that the exchange of the will-call or may-call-live list
08:19:01 12 was done in good faith.

08:19:03 13 And so, I want you to address how I balance what
08:19:07 14 I do between the party witnesses and the nonparty
08:19:11 15 witnesses.

08:19:12 16 MR. JOHN: Well, your Honor, the Intel case, as
08:19:16 17 you mentioned, the choice there was to have a trial in
08:19:21 18 Waco or not have a trial at the foreseeable future because
08:19:25 19 the Austin court was closed. We don't have that problem
08:19:27 20 here, your Honor.

08:19:29 21 Holding the case in Midland, it would comply more
08:19:34 22 with the CDC regulations, not just because of the party
08:19:39 23 witness versus the third-party witnesses. We contend that
08:19:44 24 maybe the third-party witnesses are closer to Midland and
08:19:48 25 within subpoena power of Midland. None of them are in the

08:19:52 1 subpoena power of Waco. And everyone will have to travel
08:19:55 2 to Waco, whether they're party witnesses or not.

08:19:57 3 If COVID is the concern and safety is the
08:20:00 4 concern, it doesn't matter whether it's party witnesses or
08:20:03 5 not party witnesses. We're talking about 17 witnesses
08:20:07 6 that would have to travel where a case the trial in
08:20:12 7 Midland would provide an opportunity for most people not
08:20:15 8 to travel. And that itself -- and that's the only issue
08:20:19 9 right now would justify moving the trial, it's the COVID
08:20:25 10 issue, because, otherwise, the time to challenge for
08:20:27 11 convenience venue challenge is way over, three years.
08:20:33 12 It's been almost three years.

08:20:34 13 And also, the Court has been implementing its
08:20:40 14 COVID protocol for months now, and PCC never addressed or
08:20:44 15 complained about the venue at that time. Only at the eve
08:20:48 16 of trial is PCC now asking to move the trial, and it leads
08:20:53 17 me to believe that rather than safety issues, this may be
08:20:57 18 an attempt at a strategy for PCC because even -- safety
08:21:08 19 issue, the code issue's the only justification to even
08:21:14 20 contemplate moving the trial. But when you have 17
08:21:16 21 witnesses and 14 of them are closer to Midland, I think
08:21:21 22 safety issues point to holding the trial in Midland.

08:21:29 23 THE COURT: Ms. Hargrove.

08:21:31 24 MS. HARGROVE: Yes, your Honor.

08:21:32 25 In terms of what the case law says about weighing

08:21:36 1 sort of party witnesses versus nonparty witnesses, it's
08:21:40 2 quite clear that the convenience and interests and, I
08:21:43 3 would say here, safety of nonparty witnesses is the more
08:21:47 4 important factor. I could point your Honor to your recent
08:21:51 5 opinions.

08:21:52 6 And I apologize if I'm butchering how you say
08:21:55 7 these names, but the Kuster vs. Western Digital case, the
08:21:59 8 STC vs. Apple case, which also is citing the Fed Circuit
08:22:05 9 in In Re: Genentech at 566 F. 3d, 1338. All of these
08:22:10 10 cases say that the convenience and interests of the
08:22:12 11 nonparties are given more weight and more consideration
08:22:17 12 than the convenience of the parties. And this makes
08:22:21 13 sense. All parties will be inconvenienced by a trial, no
08:22:24 14 matter where that trial takes place.

08:22:30 15 In terms of our failure -- what's characterized
08:22:33 16 as our failure to move to transfer venue until recently,
08:22:36 17 absolutely, we did not move to transfer venue until
08:22:39 18 recently: that was because of quite extraordinary and
08:22:46 19 unusual circumstances related to the pandemic, is because
08:22:48 20 of the fact that this is a patent infringement case among
08:22:51 21 competitors in which we are seeking injunctive relief, and
08:22:54 22 it is of critical importance to our client to secure a
08:22:57 23 timely and safe trial setting.

08:23:01 24 And I'm sure the Court recalls that in December,
08:23:04 25 we held a hearing in this matter in which the Court

08:23:07 1 indicated that we would be holding trial in Waco.
08:23:10 2 Everyone seemed fine and on board with that. And so, PCC
08:23:13 3 had assumed for a period of time that we would be holding
08:23:17 4 trial in Waco. True Chem at the same time went and moved
08:23:23 5 for continuance of that trial setting, then did object to
08:23:26 6 holding trial in Waco. And so, after that continuance was
08:23:30 7 granted that, at that point, we went ahead and moved to
08:23:33 8 transfer venue.

08:23:34 9 So this is not some kind of a mysterious, you
08:23:38 10 know, waiting to secure advantage at the end situation.
08:23:41 11 These are just unusual -- we are all living in what
08:23:44 12 sometimes feels like an alternative universe right now,
08:23:47 13 unusual circumstances. In terms of safety, I don't think
08:23:52 14 it could reasonably be suggested that the Waco courthouse
08:23:56 15 isn't one of the best equipped courthouses around to hold
08:24:01 16 a -- try an in-person jury trial during COVID. Your Honor
08:24:05 17 has, from what I can tell already, conducted several of
08:24:09 18 those trials. You're doing so right now.

08:24:12 19 I've reviewed the detailed opinion that was -- or
08:24:14 20 order that you entered in this Intel case listing all of
08:24:20 21 the protocols that would be undertaken in the COVID -- in
08:24:23 22 the Waco courthouse, specifically using the layout of the
08:24:26 23 Waco courthouse specifically to promote the safety of the
08:24:29 24 parties and the witnesses. And so, there is no
08:24:34 25 dispositive factor here. But if you weigh all of these

08:24:37 1 factors in light of the unusual situation in which we find
08:24:42 2 ourselves, those factors, the balance clearly points to
08:24:47 3 having trial in Waco.

08:24:50 4 MR. JOHN: Your Honor, may I address some of
08:24:51 5 those points?

08:24:53 6 THE COURT: Of course.

08:24:54 7 MR. JOHN: Your Honor, as far as convenience of
08:24:56 8 third parties concerned, it is important. We're not
08:24:59 9 disputing that. However, PCC has known for months about
08:25:05 10 the convenience issues of the third parties, and they
08:25:08 11 didn't bring it up until right now. Why is it suddenly,
08:25:12 12 that's important?

08:25:13 13 Well, one of their reasons that they do cite is
08:25:16 14 the Intel case. Well, the Intel case was originally filed
08:25:21 15 in Waco, your Honor, and then, there was transfer, and
08:25:24 16 then, it was re -- that case law does support revisiting
08:25:27 17 and re -- you know, going back, undoing a transfer.
08:25:33 18 That's different from what we have here. This case was
08:25:35 19 never filed in Waco. And the convenience issue was not
08:25:39 20 brought up at all, and the time to bring that up is not at
08:25:44 21 the eve of trial.

08:25:45 22 And holding the court -- the trial in Midland is
08:25:50 23 not going to affect the trial setting. In fact, we
08:25:53 24 already had a trial setting. The Court had a scheduling
08:25:56 25 conflict, but the Midland trial was going to go forward.

08:26:02 1 So the timeliness, it's not an issue here. And also, the
08:26:06 2 sudden interest in timeliness is curious because PCC had
08:26:11 3 agreed on multiple occasions to adjust the scheduling
08:26:15 4 order and push the trial back. Both parties had agreed on
08:26:18 5 that and had amended the scheduling order many times
08:26:21 6 during the case.

08:26:22 7 The other issue is, there's no evidence that the
08:26:27 8 -- presented by PCC that the Midland court is worse off
08:26:32 9 with regard to safety than the Waco court. And other than
08:26:37 10 attorney arguments about how something is more medically
08:26:41 11 better or not, without any evidence, you know, it's -- the
08:26:46 12 evidence is simply not there. The Midland court is
08:26:50 13 operating and PCC was well aware of the -- all the Western
08:26:54 14 District protocols that had been implemented. Whereas the
08:26:57 15 Austin court is closed, Midland court is operational and
08:27:01 16 the Waco court is operational.

08:27:03 17 However, this case has nothing to do with Waco,
08:27:06 18 your Honor. This just comes out of nowhere. And lastly,
08:27:10 19 the parties did not concede and agree to Waco in the
08:27:14 20 previous hearing, as Ms. Amstutz suggested. The Court had
08:27:21 21 basically instructed the parties that it was going to be
08:27:27 22 in Waco. We never really agreed.

08:27:31 23 THE COURT: Ms. Hargrove, anything else?

08:27:34 24 MS. HARGROVE: Just a couple of brief points.
08:27:36 25 One is that timeliness is absolutely an issue here. I

08:27:41 1 don't see how you could dispute that in order to get a
08:27:45 2 setting in Midland, you're going to be coordinating
08:27:47 3 multiple court dockets and calendars. It will be up Judge
08:27:51 4 Counts when a trial setting can be obtained. And, you
08:27:55 5 know, in terms of the legal analysis, just briefly, we've
08:27:59 6 cited the Court to many cases in our reply showing courts
08:28:04 7 considering circumstances that have arisen after filing of
08:28:08 8 the lawsuit.

08:28:08 9 Venue law in 1404(a) law does not require the
08:28:14 10 Court to engage in a fictional analysis, and that is
08:28:18 11 particularly the case because this is a convenience and
08:28:21 12 justice inquiry in which the court has considerable
08:28:25 13 discretion, especially for an intra-district transfer like
08:28:28 14 this one is. And in fact, even the -- one of the seminal
08:28:34 15 cases on this, the Volkswagen I case, which is 374 F. 3d
08:28:41 16 201, is an example of a case -- it wasn't a retransfer
08:28:44 17 situation, but it's an example of a case where once
08:28:47 18 third-party defendants were added, the court said it was
08:28:50 19 obligated in this convenience analysis to consider the
08:28:54 20 changed nature of the lawsuit.

08:28:55 21 So there is a lot of authority out there
08:28:59 22 supporting the Court's ability to consider the state of
08:29:02 23 the world as it really exists in reality today. We don't
08:29:06 24 have to engage in a fiction and put on blinders and not
08:29:09 25 consider the fact that we're all enduring a pandemic right

08:29:12 1 now. The Court has considerable discretion. And then,
08:29:18 2 with that, I'll stop unless you have questions, your
08:29:21 3 Honor.

08:29:21 4 MR. JOHN: Your Honor, may I address that?

08:29:23 5 THE COURT: Of course.

08:29:24 6 MR. JOHN: Your Honor, with regard to the
08:29:26 7 Volkswagen case, PCC has to show that the Waco trial would
08:29:33 8 be clearly more convenient, and I don't believe they have
08:29:37 9 shown that. We listed the number -- the total number of
08:29:43 10 witnesses, including third-party witnesses that are closer
08:29:45 11 to Midland and won't have to get hotel rooms in Waco.

08:29:48 12 Also, Volkswagen requires that all reasonable
08:29:53 13 inferences and all factual conflicts are resolved in favor
08:29:58 14 of the nonmoving party, which is True Chem. So I don't
08:30:05 15 think Volkswagen supports the PCC's position.

08:30:08 16 And as far as the, you know -- Ms. Amstutz's
08:30:16 17 statement we have to deal with what's in the real world,
08:30:18 18 yes, let's do that, your Honor. What's in the real world
08:30:20 19 is, there is a pandemic, and since CDC has definitely
08:30:25 20 recommended that travel be limited, hotel stays, things
08:30:29 21 like that, can cause problems.

08:30:34 22 The Court would be better off holding the case --
08:30:37 23 holding the trial in Midland with regard to what is going
08:30:40 24 on with the pandemic right now, and there's no evidence
08:30:43 25 that the Midland court is not capable of holding a safe

08:30:50 1 trial. In fact, it's doing so. Because this case has
08:30:55 2 nothing to do with Waco, there was never any parties in
08:30:59 3 Waco, there was nothing happening in Waco with regard to
08:31:02 4 this trial, Midland is the better place to hold this
08:31:08 5 trial.

08:31:10 6 THE COURT: Ms. Hargrove, anything else?

08:31:14 7 MS. HARGROVE: The fact that the parties are in
08:31:16 8 Midland is one of several factors. The balance of these
08:31:18 9 factors clearly favors Waco here, not only in light of the
08:31:23 10 pandemic but, also, in light of the location of the
08:31:25 11 third-party witnesses, the location of the documentary
08:31:29 12 proof, and so forth. But in particular, we're not trying
08:31:34 13 to say it's impossible -- it's physically impossible to
08:31:37 14 have a trial in Midland, but that's not the burden.

08:31:40 15 The burden is to show that the balance of the
08:31:42 16 factors favors Waco. And there's no question that this
08:31:47 17 court has undertaken significant effort in order to figure
08:31:52 18 out how to safely hold or hold a trial as safely as
08:31:57 19 humanly possible in the Waco courthouse. So these
08:32:01 20 factors, balanced as a whole, strongly and clearly favor
08:32:04 21 trial in Waco.

08:32:07 22 MR. JOHN: Your Honor, may I address?

08:32:09 23 THE COURT: Only if you're going to say something
08:32:12 24 I haven't heard.

08:32:13 25 MR. JOHN: I want to address the factors, your

08:32:15 1 Honor. The factors on balance did not favor moving to
08:32:21 2 Waco. The relative ease of access to sources of proof,
08:32:27 3 your Honor, all of the accused trailers are in the Midland
08:32:30 4 area. All the sales, marketing, technical information,
08:32:33 5 employment information, everything is in Midland,
08:32:36 6 availability of compulsory process.

08:32:38 7 THE COURT: Mr. John, I don't understand what you
08:32:41 8 mean by that. What do you mean they're in Midland? Are
08:32:46 9 you bringing that stuff into the courtroom?

08:32:50 10 MR. JOHN: Your Honor, the evidence, the accused
08:32:53 11 product is in Midland.

08:32:53 12 THE COURT: I understand that. The accused
08:32:59 13 product I'm dealing with in the trial right now is -- what
08:33:01 14 difference does it make if the accused product -- if the
08:33:04 15 accused product is in Midland?

08:33:08 16 MR. JOHN: If it's -- if, for whatever reason,
08:33:11 17 it's called -- any further evidence is --

08:33:13 18 THE COURT: Are we going to take a field trip?

08:33:16 19 MR. JOHN: Well, I wasn't planning on it at this
08:33:19 20 time, but if something like that comes up --

08:33:21 21 THE COURT: I am just not following you. I get
08:33:24 22 that the physical objects are located in Midland but
08:33:29 23 that's -- you know, in terms of the safety and welfare of
08:33:33 24 the witnesses, I don't see where that makes much
08:33:35 25 difference.

08:33:36 1 MR. JOHN: Okay. Your Honor, I'll move on from
08:33:38 2 that.

08:33:38 3 THE COURT: Okay.

08:33:39 4 MR. JOHN: That point. The cost of attendance
08:33:41 5 for witnesses, for most of the witnesses, that would be
08:33:45 6 Midland. The availability of compulsory process, that's
08:33:51 7 more in Midland. So a lot of private interest factors
08:33:59 8 would support the Midland trial. And so, the factors as a
08:34:04 9 whole, we contend, actually supports holding the case in
08:34:08 10 Midland.

08:34:09 11 THE COURT: Okay. Ms. Hargrove, anything else?

08:34:12 12 MS. HARGROVE: No, your Honor.

08:34:15 13 THE COURT: We will -- I appreciate all of the
08:34:18 14 information you all gave me this morning. Give me one
08:34:20 15 second.

08:34:31 16 MR. JOHN: Your Honor, there's --

08:34:33 17 THE COURT: Yes, sir.

08:34:34 18 MR. JOHN: Thank you, your Honor.

08:34:35 19 I wanted to mention one last thing is the local
08:34:39 20 interest, your Honor. This is a frac trailer case --

08:34:44 21 THE COURT: Counsel, I'm way past the local
08:34:47 22 interest or all that other stuff. I'm just trying to
08:34:50 23 figure out, what is the safest way to have a trial,
08:34:53 24 balancing between who the witnesses are. I get the local
08:34:57 25 interest. If this were -- if this were December of 2019,

08:35:02 1 we would be trying this case in Midland, and so, it's not.
08:35:07 2 It's February of 2021, and I'm just trying to do the best
08:35:11 3 I can to make it as safe for everyone that's involved,
08:35:15 4 balancing everything so we can have a trial.

08:35:19 5 And this case has taken -- and also, if this case
08:35:22 6 were only 18 months old, I'd say let's wait until October
08:35:28 7 or November or December, whatever. This case is, like you
08:35:31 8 said, three years old. I'm trying to get it to trial, and
08:35:34 9 I'm trying to do that and balance the -- and your folks
08:35:38 10 brought -- I think I'm right. Your folks brought the
08:35:41 11 case, right?

08:35:42 12 MR. JOHN: Yes, your Honor.

08:35:42 13 THE COURT: So I would assume when you brought
08:35:45 14 the case, you have an interest in me getting it to trial.

08:35:48 15 MR. JOHN: Yes, sir.

08:35:49 16 THE COURT: So I get all the issues you've talked
08:35:51 17 about. When my order comes out, it's going to be -- and I
08:35:57 18 don't know what I'm going to do. I was about to talk to
08:35:59 19 my clerk here and find out when we'll get the order out.
08:36:02 20 It will be soon. But I'm not trying to move this case to
08:36:08 21 Waco for any reason other than if on balance, I feel it's
08:36:12 22 safer for the majority of people involved to have it here.
08:36:15 23 If I think it's safer to do it in Midland, I'll do it in
08:36:19 24 Midland. And that's what I'm trying to accomplish here.

08:36:23 25 I get all of your other arguments. I get that

08:36:26 1 it's late that we're dealing with this. I get it's
08:36:28 2 different from the Intel trial. Everything you've said, I
08:36:31 3 fully understand. But I am going to -- there's no right
08:36:36 4 answer. I'm just going to have to do what I can to figure
08:36:39 5 out what is the safest thing.

08:36:41 6 I don't believe that opposing counsel has some
08:36:44 7 mischievous reason for wanting it to be in Waco. I think
08:36:50 8 it's -- and so, I'm not ascribing anything to them like
08:36:53 9 that, which you suggested. I'm just going to try and do
08:36:58 10 the best I can to try the case in the place that's the
08:37:00 11 safest as possible. And so, I'll be back in a few
08:37:03 12 seconds.

08:37:08 13 MR. JOHN: Thank you.

08:37:59 14 THE COURT: Okay. Thank you all for your
08:38:01 15 briefing and arguments this morning. We'll have an order
08:38:03 16 out by the end of the week on this. Have a good day.
08:38:07 17 Take care.

08:38:07 18 MR. JOHN: Thank you, your Honor.

08:38:09 19 MS. HARGROVE: Thank you, your Honor.

20 (Proceedings concluded.)

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4 UNITED STATES DISTRICT COURT)

5 WESTERN DISTRICT OF TEXAS)

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